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MASHKON HJ SAMURI v. ORANG KAMPUNG HOLDINGS (M) SDN BHD

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
ABANG ISKANDAR JCA
B VERNON ONG LAM KIAT JCA
[CIVIL APPEAL NO: W-02-639-04-2014]
26 JANUARY 2016

C ***ADMINISTRATIVE LAW:*** *Judicial review – Decision of Industrial Court ('IC') – IC found dismissal of employee without just and valid excuse – Whether IC considered circumstances of case in totality – Whether evidence of witnesses subjected to detailed analysis – Whether IC had jurisdiction to depart from punishment meted out by employer*

D ***LABOUR LAW:*** *Employment – Dismissal – Employee sanctioned by way of warning letter – Whether subsequent dismissal based on same misconduct amounted to being penalised twice – Whether allowed by law – Whether proven misconduct by employee deserved punishment of dismissal – Whether dismissal with just and valid excuse*

E The appellant's employment with the respondent ('the company') was terminated pursuant to an internal investigation which was conducted in respect of three original charges against him. Apart from the three original charges, the appellant also faced an additional set of 11 new charges. The appellant pleaded guilty to the three original charges. However, the panel members of the Disciplinary Inquiry ('DI') found that the 11 new charges F were serious offences and the explanations given by the appellant were not acceptable. Therefore the DI was of the view that the appellant's service with the company ought to be terminated. The Industrial Court ('IC') found that the appellant's termination was without just and valid excuse and that the dismissal was not an appropriate order under the circumstances of the case. G The IC awarded compensation and backwages to the appellant. Dissatisfied, the company filed an application for judicial review to quash the decision of the award. The High Court Judge ('HCJ') allowed the judicial review application holding that the dismissal was with valid and just excuse. Hence, this appeal by the appellant on the ground that the HCJ had erred in law and H in fact.

Held (allowing appeal with costs)
Per Abang Iskandar JCA delivering the judgment of the court:

I **(1)** As the appellant had been sanctioned by way of a warning letter pertaining to his breach of non-clocking in of his time card, in law, no further or subsequent action could be taken against him. The company had based its disciplinary action against the appellant on the same breach, for which he had been penalised, *albeit* by way of a letter of

warning. Such an action of the company was not allowed by the law, wherein the appellant had been penalised twice for the same offence. (paras 9 & 10)

(2) Having established the factum of misconduct on the part of the employee, the IC would then proceed to consider 'whether the proven misconduct constitutes a just cause or excuse for the dismissal'. Hence, it is important for the IC to see whether on the totality of the circumstances, the proven misconduct committed by the errant employee deserves the punishment of dismissal. The IC is enabled by statute to exercise equity in deserving cases and to say that the matter of punishment resides solely and wholly within the province of the employer's domain is effectively to deny the scope of justice which the IC can dispense. The HCJ had misdirected on the law pertaining to proportionality of punishment. The right no longer resided within the exclusive province of the employer in the private sector employment. (paras 11 & 18)

(3) It is trite that pleadings require material facts to be pleaded. Particulars that would materially constitute the charges would need to be pleaded with sufficient clarity. Failure to abide by the crucial rule on pleadings would disentitle the pleader to lead evidence on the same for the purpose of establishing purported charges. The 11 charges were pleaded but the material facts pertaining to the 11 new charges were not pleaded. The IC had adverted to the situation in the award, leading to the conclusion that the failure to plead the material facts had prejudiced the appellant. There was no valid reason to disturb the finding and in doing so, the HCJ had fallen into error. (para 19)

(4) The IC award showed that the evidence of the witnesses had been taken into account and had been subjected to a detailed analysis. Hence, it was not justified for the HCJ to conclude that the IC had erred in not taking into consideration the six witnesses brought forward by the appellant. (para 22)

(5) It was wrong for the HCJ to fault the IC that the award was based on an unpleaded complaint or cause of action of condonation on the part of the company. The IC only made a passing remark on the evidence which would appear to show condonation on the part of the company. However, the ground for granting of the award was not condonation. (para 23)

(6) There was merit in the complaint raised by the appellant that the HCJ had erred in law and in fact in failing to appreciate that the failure to hand over duty which the appellant was accused of was committed in January 2007 whereas the judgment in default and the court actions referred to by the HCJ happened before the order of the transfer of duties in 2008. There was clear mislocation of the evidence thereby leading the

HCJ to link the two events erroneously. The company had also failed to show that the failure to hand over duty properly had in fact resulted in important information not being passed to the company thereby exposing the company to various unfavourable legal actions. (paras 24 & 25)

(7) As the case for a dismissal against the appellant had not been established by the company, there was no just and valid excuse to dismiss the appellant. The IC had the necessary jurisdiction to depart from the punishment that was meted out by the employer as the circumstances warranting such a drastic punishment were not established by the company. Therefore, there was no jurisdictional error committed by the IC for the HCJ to disturb the award. (para 28)

Bahasa Malaysia *Headnotes*

Perkhidmatan perayu dengan responden ('syarikat') ditamatkan berikutan siasatan dalaman yang dijalankan berkaitan tiga pertuduhan asal terhadapnya. Selain tiga pertuduhan asal tersebut, perayu dikenakan 11 pertuduhan tambahan baharu. Perayu mengaku bersalah terhadap tiga pertuduhan asal tersebut. Walau bagaimanapun, ahli-ahli panel Inkuiri Tatatertib ('IT') mendapati bahawa 11 pertuduhan tambahan yang baharu adalah kesalahan-kesalahan serius dan penjelasan perayu tidak boleh diterima. Oleh itu, IT berpendapat bahawa perkhidmatan perayu dengan syarikat wajar ditamatkan. Mahkamah Perusahaan ('MP') mendapati bahawa penamatan perayu adalah tanpa alasan adil dan sah dan penamatan tersebut bukan perintah wajar dalam hal keadaan kes ini. MP mengawardkan pampasan dan gaji kebelakang kepada perayu. Tidak berpuas hati, syarikat memfailkan permohonan semakan kehakiman untuk membatalkan keputusan award tersebut. Hakim Mahkamah Tinggi ('HMT') membenarkan permohonan semakan kehakiman memutuskan bahawa penamatan tersebut adalah atas alasan sah dan adil. Oleh itu, rayuan ini oleh perayu atas alasan bahawa HMT terkhilaf dari segi undang-undang dan fakta.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Abang Iskandar HMR menyampaikan penghakiman mahkamah:

(1) Oleh sebab perayu dihukum melalui surat amaran berkaitan pelanggaran mengejam masa dalam kad masanya, dari segi undang-undang, tiada tindakan lanjut atau kemudian boleh diambil terhadapnya. Syarikat, bagi tindakan disiplin terhadap perayu telah bersandar atas pelanggaran yang sama, di mana perayu telah pun dihukum, iaitu dengan surat amaran. Tindakan sedemikian oleh syarikat tidak dibenarkan oleh undang-undang, di mana perayu dihukum dua kali bagi kesalahan yang sama.

(2) Selepas membuktikan fakta salah laku oleh pekerja, MP akan seterusnya mempertimbangkan 'sama ada salah laku yang dibuktikan membentuk alasan atau sebab adil untuk penamatan'. Dengan itu, penting bagi MP

menentukan sama ada atas keseluruhan hal keadaan kes, salah laku yang dibuktikan dilakukan oleh pekerja yang bersalah perlu dihukum dengan penamatan. MP diberi kuasa oleh statut untuk melaksanakan ekuiti dalam kes-kes yang wajar dan untuk menyatakan bahawa perkara hukuman hanya terletak atas dan dalam bidang kuasa majikan secara efektifnya menafikan skop keadilan yang boleh diberikan oleh MP. Hakim Mahkamah Tinggi tersalah arah dari segi undang-undang berkaitan kekadaran hukuman. Hak tersebut bukan lagi dalam bidang kuasa eksklusif majikan dalam pekerjaan sektor swasta.

(3) Adalah matan bahawa pliding memerlukan fakta-fakta penting untuk diplidkan. Butir-butir penting yang membentuk pertuduhan perlu diplidkan dengan jelas. Kegagalan mematuhi kaedah penting pliding akan menafikan pihak yang memplid mengemukakan keterangan bagi tujuan membuktikan pertuduhan-pertuduhan yang dikenakan. Sebelas pertuduhan telah diplidkan tetapi fakta-fakta penting berkaitan 11 pertuduhan baharu tambahan tersebut tidak diplidkan. MP telah merujuk kepada keadaan tersebut dalam award yang menjurus kepada kesimpulan bahawa kegagalan memplid fakta-fakta material telah memprejudiskan perayu. Tiada alasan sah bagi HMT mengganggu dapatan tersebut dan dengan berbuat demikian, telah terkhilaf.

(4) Award MP membuktikan bahawa keterangan saksi-saksi dipertimbangkan dan dianalisis secara terperinci. Oleh itu, tidak wajar bagi HMT memutuskan bahawa MP terkhilaf kerana tidak mempertimbangkan enam saksi yang dikemukakan oleh perayu.

(5) Adalah khilaf bagi HMT menyalahkan MP bahawa award tersebut berasaskan aduan yang tidak diplidkan atau kausa tindakan pemaafan oleh syarikat. Mahkamah Perusahaan hanya membuat kenyataan semata-mata atas keterangan yang menunjukkan pemaafan oleh syarikat. Walau bagaimanapun, alasan bagi pemberikan award bukan pemaafan.

(6) Terdapat merit dalam aduan yang dibangkitkan oleh perayu bahawa HMT terkhilaf dari segi undang-undang dan fakta kerana gagal mempertimbangkan kegagalan menyerahkan tugas yang dipertuduh dilakukan pada Januari 2007 sementara penghakiman ingkar dan tindakan-tindakan mahkamah yang dirujuk oleh HMT berlaku sebelum perintah pertukaran tugas pada 2008. Jelas wujud kesilapan pengenalpastian keterangan yang membawa kepada HMT mengaitkan kedua-dua perkara tersebut secara khilaf. Syarikat juga gagal menunjukkan bahawa kegagalan menyerahkan tugas dengan sewajarnya mengakibatkan maklumat penting tidak diberikan kepada syarikat yang mendedahkan syarikat kepada tindakan undang-undang yang tidak wajar.

(7) Oleh sebab kes penamatan kerja perayu tidak dibuktikan oleh syarikat, tiada alasan adil dan sah untuk menamatkan pekerjaan perayu. MP mempunyai bidang kuasa yang diperlukan untuk menyimpang daripada

A hukuman yang diberikan oleh majikan kerana hal keadaan mewajarkan hukuman drastik sedemikian tidak dibuktikan oleh syarikat. Dengan itu, tiada kekhilafan dari segi bidang kuasa dilakukan oleh MP untuk HMT mengganggu award tersebut.

B **Case(s) referred to:**
Bayer (M) Sdn Bhd v. Ng Hong Pau [1999] 4 CLJ 155 CA ***(refd)***
Continental Challenge Sdn Bhd & Ors v. Loi Teh Ong [2003] 3 ILR 780 ***(refd)***
Ghani & Co v. Lisa Koh Hui Meng [2008] 1 ILR 669 ***(refd)***
Milan Auto Sdn Bhd v. Wong Seh Yen [1995] 4 CLJ 449 FC ***(foll)***
Norizan Bakar v. Panzana Enterprise Sdn Bhd [2013] 9 CLJ 409 FC ***(foll)***
C *Subramanyah AJ Karuppiah v. Bank Negara Malaysia [2011] 2 CLJ 178 CA* ***(refd)***
Sunmugam Subramaniam v. JG Containers (M) Sdn Bhd & Anor [2000] 6 CLJ 521 HC ***(refd)***
Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(refd)***

D **Legislation referred to:**
Industrial Relations Act 1967, s. 20(3)

For the appellant - Atan Mustaffa Yussof Ahmad; M/s Ainul Azam & Co
For the respondent: Mahfuzah Mohd Faizi; M/s Nurhayati & Mahfuzah

[Editor's note: For the High Court judgment, please see Orang Kampung Holdings (M) Sdn
E *Bhd lwn. Mashkon Hj Samuri [2014] 1 LNS 798 (overruled).]*

Reported by S Barathi

JUDGMENT

F **Abang Iskandar JCA:**

Brief Facts Of The Case

[1] Mashkon bin Hj Samuri ("the respondent") was formerly an employee of Orang Kampung Holdings (M) Sdn Bhd ("the applicant"). Parties are
G referred to as they were so referred to in the High Court for the judicial review application.

[2] The respondent's service was terminated by a one month notice of termination dated 20 March 2007, with effect from 21 March 2007. The respondent was also given a month pay by virtue of "surat pengesahan
H jawatan" dated 1 April 2000.

[3] Prior to the notice of termination, an internal investigation was conducted in respect of three original charges against the respondent ie, (i) failure to complete handover duties to the acting factory manager, (ii) failure to use the punch card since 1 January 2007, and (iii) failure to
I comply with the instructions of the company in participating in a game at Majlis Sukan Melaka. Apart from these three original charges, an additional set of 11 new charges was slapped against the respondent, *inter alia*, for delay in remitting the workers' KWSP payments, the abandonment of broken

waste water treatment, and pending to audit 2004 account until the end of 2006, etc. The respondent pleaded guilty for the three original charges but for the new 11 charges, the panel members of the disciplinary inquiry ("the DI") found that they were serious offences and the explanations given by the respondent were not acceptable. Thus, it was the view of the DI that the respondent's service with the applicant must be terminated. So it had come to pass.

[4] Aggrieved by the termination, the respondent referred this matter to the Industrial Court ("the IC") pursuant to the provisions in the Industrial Relations Act 1967 ("the IRA"). On 11 July 2013, the IC found that the respondent was terminated without just and valid excuse, and that the dismissal was not an appropriate order under the circumstances of this case. The IC also awarded the respondent the sum of RM33,810 as a compensation, and backwages at RM57,960.

[5] Dissatisfied with the decision of the IC, the applicant company then filed an application for judicial review in Kuala Lumpur High Court to quash the decision of the award by the IC dated on 11 July 2013.

[6] On 27 February 2014, the learned High Court Judge allowed the judicial review application as it was of the view that the dismissal by the applicant's company was with valid and just excuse. The learned High Court Judge ordered the respondent employee to pay costs of RM5,000. Thus, this appeal by the respondent employee before us.

The Appeal

[7] We had heard both parties during the appeal. As stated in the memorandum of appeal, counsel for the respondent employee contended that the learned High Court Judge had erred in law and in fact on the following:

(i) in failing to consider that the wrongful acts of the respondent as petty or did not hold that the failure to do a proper transfer of duties resulted in important information not being passed and exposed the applicant to losses and court actions;

(ii) in failing to appreciate that the failure to handover duty which the accused has committed in January 2007 whereas the judgment in default and the court's actions referred to by the learned High Court Judge happened before the order of the transfer of duties in 2006;

(iii) in failing to appreciate that there was no evidence by the applicant that failure to do a proper handover duty resulted in important information not being passed and exposed the applicant to losses such as judgment in default and court actions;

(iv) in failing to appreciate that the failure by the respondent in clocking his time card, the respondent was given warning and under the law a person who has been punished with warning could not be punished for the same offence with dismissal;

(v) in holding that as an employer the applicant is in the best position to determine the seriousness of the misconduct of the respondent in opposition of the legal principles in *Norizan Bakar v. Panzana Enterprise*;

(vi) in applying the authority of *Subramanyah AJ Karuppiah v. Bank Negara Malaysia* in respect of dismissal of a public office under the General Orders 1980 and not on dismissal of an employee under s. 20(3) of the Industrial Relations Act 1967;

(vii) in holding that all 11 new charges were not pleaded whereas in the Industrial Court it was held that the facts in respect of the 11 new charges were not pleaded. And not that the 11 new charges were not pleaded;

(viii) in giving unjustifiable weight on the issue on whether the internal investigations conducted on the applicant could be revived (dipulihkan) by way of a *de novo* trial in the Industrial Court;

(ix) in holding that the Industrial Court had erred in not taking into consideration six witnesses brought forward by the respondent whereas it is clear that the evidence of the six witnesses have been considered; and

(x) in holding that the Industrial Court had erred in taking into consideration the issue of condonation of the 11 new charges whereas the issue of 'condonation' was not the determining factor in allowing the respondent's claims.

[8] Having heard parties, we proceeded to deal with the various grounds stated in the memorandum of appeal, we had delved all of them for reason that will become obvious later on in this grounds of judgment. We will deal with the grounds that follow.

The learned High Court Judge erred in law and in fact in failing to appreciate that the failure by the respondent in clocking his time card, the respondent was given a warning and under the law a person who has been punished with a warning could not be punished for the same offence with dismissal

[9] On this issue, it was not disputed that the respondent had been given letter of warning for his so-called recalcitrant conduct pertaining to the clocking in his time card. That was an admitted factual circumstance. The legal impact of that action by the applicant against the respondent would be that no further action could be taken against the respondent subsequently based on the same impugned conduct of not clocking in his time card. The evidence in this case had shown that after the warning letter was sanctioned against the respondent, there was no other intransigence committed by the respondent in relation to clocking in of his time card. As such, as the respondent had been sanctioned by way of a warning letter pertaining to his breach of non-clocking in of his time card, no further or subsequent action

could in law be taken against the respondent. In this case, the applicant had based its disciplinary action against the respondent on the same breach of non-clocking of his time card, for which he had been penalised, *albeit* by way of a letter of warning. We are in agreement with the learned counsel that such an action of the applicant was not allowed by the law, as was clearly set out in the case of *Ghani & Co v. Lisa Koh Hui Meng* [2008] 1 ILR 669 where it was held by the court as follows:

> Even on the assumption that the contents of COB p. 14 are true, this court finds that the respondent having issued the claimant with such a letter of warning which is a punishment itself cannot resile from it and convert the allegation of poor or unsatisfactory performance as stated in this letter of warning to be the foundation for its decision to terminate the services of the claimant subsequently for reason that this alleged poor or unsatisfactory performance is spent and irrelevant except that it can only be taken into consideration when deciding the quantum of punishment for any subsequent charge or charges. There is however no allegation of any subsequent charge or charges. This ground must necessarily fail.

[10] The learned chairman had duly recognised this as could be seen from her ruling on the issue in her award. By doing what the applicant had done, in fact, the respondent had been penalised twice for the same offence of non-clocking his time card for which he had been penalised, prior. To make it worse, it also had been made the basis for the respondent's dismissal. With due respect, that cannot, and ought not to be done as it has no legal wall to lean on. As such, in our view, it was erroneous on the part of the learned High Court Judge to disturb the former's finding on the issue.

The learned High Court Judge erred in law and in fact in holding that as the employer the applicant company was therefore in the best position to determine the seriousness of the misconduct of the respondent thereby acting in opposition of the legal principles laid down in the Federal Court case of *Norizan Bakar v. Panzana Enterprise*; and

The learned High Court Judge erred in law and in fact in applying the authority of *Subramanyah AJ Karuppiah v. Bank Negara Malaysia* in respect of dismissal of a public officer under the General Orders 1980 and not on dismissal of an employee under s. 20(3) of the Industrial Relations Act 1967

[11] We shall deal with these two grounds together as they dealt with the same issue, an issue that is of great significance as it would impact on the kind of punishment that ought to be visited upon the respondent. In fact, this matter goes to the fundamental root of the matter as regards the kind of punishment that ought to be meted on the respondent. The principle in the Federal Court case of *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449 ("*Milan Auto* case") is aimed directly at this issue, especially the second limb of the principle where it has been said that having established the factum of misconduct on the part of the employee, the IC would then proceed on to consider "whether the proven misconduct constitutes a just cause or excuse

for the dismissal". In other words, dismissal from employment has been metaphorically likened to the death sentence in a capital offence case. Indeed, it has dire consequences on an employee's livelihood. So, it is important for the IC to see whether on the totality of the circumstances, the proven misconduct committed by the errant employee deserves the punishment of dismissal. An employee comes to the IC for justice and it has been said time and again that the IC is enabled by statute to exercise equity in deserving cases. To say that the matter of punishment resides solely and wholly within the province of the employer's domain is effectively to deny the scope of justice which the IC can dispense justice in a case brought before it.

[12] We were referred to the recent decision of the Federal Court in the *Norizan Bakar v. Panzana Enterprise Sdn Bhd* [2013] 9 CLJ 409; [2013] 4 ILR 477 ("*Panzana* case") where it was held that the IC can review the punishment that was meted out by the employer against the employee. We now reproduce the essential part of that important decision which in effect has reiterated what had been the correct and desirable legal position impacting on the area of punishment in employment law jurisprudence:

> ... we are of the view that the doctrine of proportionality of punishment is already inbuilt into the IRA. Thus, the Industrial Court can substitute its own view as to what is the appropriate penalty for the employee's misconduct, for the view of the employer concerned.

[13] In fact, in the case of *Sunmugam Subramaniam v. JG Containers (M) Sdn Bhd & Anor* [2000] 6 CLJ 521, the learned Faiza Thamby Chik J had occasion to say this:

> A perusal of the award would reveal that the Industrial Court in this instant case had totally failed to perform its main duty in the second limb of its twofold function as set out in *Milan Auto*. In other words, the Industrial Court failed to address its mind as regards the harshness or severity of punishment. The Industrial Court had committed a jurisdictional error of law.

[14] The error in this approach of giving exclusive power to the employer to decide on the kind of punishment which is beyond judicial scrutiny could have been caused by the mistaken adherence to what was stated in the dissenting judgement of learned NH Chan, JCA (as he then was) in the case of *Tan Tek Seng @Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771; [1996] 1 MLJ 261 ("*Tan Tek Seng* case") a case involving a dismissal from government employment of a public officer under the General Order 1980. In his dissenting judgement, the learned Justice NH Chan had stated that in the matter of meting out the punishment against the employee found guilty of misconduct, it resided within the exclusive domain of the employer, as it was rationalised that the employer would know how best to manage the affairs of the company, including matters pertaining to

personnel issues. That approach, with respect, is only relevant in cases involving disciplinary cases in the arena of public service employment, but not in the private employment sector.

[15] In this case, it was clear that the learned High Court Judge had followed the decision in the case of *Subramanyah AJ Karuppiah v. Bank Negara Malaysia* [2011] 2 CLJ 178 ("*Subramanyah* case") . In that case, the Court of Appeal had agreed with learned Justice NH Chan JCA's dissenting view in the *Tan Tek Seng* case (*supra*) and had gone on to say:

> There is no express provision relating to the right to mitigate upon punishment accorded to the employees in the terms and conditions of their employment with BNM. Therefore, the irresistible conclusion is that no such right ought to be meted to the appellant. In any event, the court is satisfied that the representation or mitigation made by the appellant in his appeal to the Governor of BNM before the punishment was affirmed, is sufficient.

[16] The court then went on to say:

> The court is satisfied that the BNM's decision to dismiss the appellant and all the five charges of misconducts against him was a reasonable decision in view of the circumstances of the case. His misconducts are serious in nature. Being the employer, BNM is the best position to determine the seriousness of the appellant's misconducts. In this respect the court is in full agreement with NH Chan JCA (dissenting) in the case of *Tan Tek Seng case* [*supra*], when he said:
>
> > The correct test is: Was it reasonable for the employers to dismiss him? If not reasonable employer would have dismiss him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view another quite reasonably take different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair; even though some other employers many not have dismissed him.

[17] Having followed the *Subramanyah* case (*supra*) the learned High Court Judge had concluded as follows: "Justeru, sebagai majikan, pemohon adalah dalam kedudukan terbaik untuk menentukan tahap keseriusan salah laku responden". (See pp. 12 to 14 additional record of appeal.

[18] With respect, we agreed with the learned counsel for the respondent that the learned High Court Judge had misdirected herself on the law on this important point pertaining to proportionality of punishment. That right is no longer residing within the exclusive province of the employer in the private sector employment.

The learned High Court Judge erred in law and in fact in holding that all 11 new charges were not pleaded whereas in the industrial court it was held that the facts in respect of the 11 new charges were not pleaded. And not that the 11 new charges were not pleaded

[19] On this issue, we were in agreement with the submissions of the learned counsel for the respondent that the learned High Court Judge had misinterpreted the factual matrix surrounding this issue thereby leading her to her erroneous finding. What had transpired had been that the 11 charges were pleaded but the material facts pertaining to those new 11 charges were not pleaded. In fact, the learned chairman of the IC had adverted to this situation in her award, thereby leading her to conclude that the failure to plead the material facts, had prejudiced the respondent in that he was put to disadvantage in putting up his answers to the 11 new charges. As is trite, pleadings require that the material facts be pleaded for reasons that must be obvious to law practitioners. It would not be sufficient to just plead the 11 new charges. Particulars that would materially constitute the charges would need to be pleaded with sufficient clarity. Failure to abide by that crucial rule on pleadings would disentitle the pleader to lead evidence on the same for the purpose of establishing purported charges. That was had happened in this case. There had simply been adherence to the basic requirement pertaining to pleading of material facts pertaining to the 11 new charges. The law is clear on this matter. The law of pleadings applies with full force in Industrial Court cases as it does to civil litigation. This can be seen in the case of *Continental Challenge Sdn Bhd & Ors v. Loi Teh Ong* [2003] 3 ILR 780 where it was held that pleadings must contain material facts. The material facts in the pleadings should state those facts which will put the respondents on their guard and tell them what they ought to meet. It was held that parties were bound by their pleadings and generally are not permitted to raise an issue if not pleaded.

[20] The learned chairman of the IC had ruled in her award as follows:

> Failing to plead these facts relating to the 11 new charges framed against the Claimant are important in that they affected the Claimant's tenure with the Company amongst other things, the Court applying the principles of equity and good conscience shall disregard them. The Court accordingly rejects the evidence that the Company adduced during the Hearing to prove these 11 new charges.

[21] We were of the view that the learned chairman of the IC had addressed that issue pertaining to the 11 new charges properly. We saw no valid reason as to why the learned High Court Judge should have disturbed her finding on that issue relating to the 11 new charges. We were of the view that she had fallen into error by doing that.

The learned High Court Judge erred in law and in fact in holding that the industrial court had erred in not taking into consideration six witnesses brought forward by the respondent whereas it is clear that the evidence of the six witnesses have been considered

[22] The award handed down by the learned chairman of the IC showed that she had indeed taken into account the evidence of the witnesses and had subjected the evidence to quite a detailed analysis as can be seen in her award. It was therefore, not justified for the learned High Court Judge to conclude in such a manner as it was against the clear record as appeared in the award of the learned chairman of the IC. Again, the learned High Court Judge had erroneously interfered with the award when there was no reason for such an interference. This had amounted to a misdirection on the part of the learned High Court Judge.

The learned High Court Judge erred in law and in fact in holding that the industrial court had erred in taking into consideration the issue of condonation of the 11 new charges whereas the issue of 'condonation' was not the determining factor in allowing the respondent's claims

[23] We agreed that this ground was not the main reason for the granting of the award. It was not pleaded by the respondent. The learned IC chairman only made a passing remark on the evidence which would appear to her to show condonation on the part of the applicant. It was therefore wrong for the learned High Court Judge to fault the IC by saying that she had made her award based on an unpleaded complaint or cause of action of condonation on the part of the applicant. It was clear to our mind that the ground for the granting of the award was something else, and it was not condonation.

The learned High Court Judge erred in law and in fact in failing to appreciate that the failure to hand over duty which was accused of was committed in January 2007 whereas the judgment in default and the court actions referred to by the learned High Court Judge happened before the order of the transfer of duties in 2006

[24] In regard to this ground of appeal, there was a clear misdirection on the part of the learned High Court Judge on the evidence such that she had arrived at a wrong conclusion. Looking at the notes of proceedings, it was clear to us that, there was merit in the complaint raised by the learned counsel for the respondent employee. There was clear a mislocation of the evidence by the learned High Court Judge thereby leading her to link the two events erroneously. The evidence did not allow her to come to that conclusion as there was in effect, no nexus to justify her conclusion.

The learned High Court Judge erred in law and in fact in failing to appreciate that there was no evidence by the applicant that failure to do a proper handover duty resulted in important information not being passed and exposed the applicant to losses such as judgment in default and court actions

[25] Having perused through the evidence as led in the IC, we were in the agreement with the respondent's counsel that the applicant had failed to show that the failure to hand over duty properly had in fact resulted in important information not being passed to the applicant thereby exposing the applicant to various unfavourable legal actions.

[26] As had been alluded to earlier, we were aware of the other grounds that were advanced by the respondent in his memorandum of appeal in his quest to challenge the decision of the learned High Court Judge. But we were of the view that the grounds that were dealt by us in the preceding paragraphs would be sufficient reasons for us to allow this appeal with costs. We therefore would not dwell on them save to indicate that we had given them our due consideration as well.

The Decision Of This Court

[27] It was therefore apparent to us that the learned High Court Judge had erred in disturbing the award that was handed down by the learned chairman of the IC by issuing a *certiorari* thereby quashing the award. It was our considered view that the learned chairman of the IC had not committed any jurisdictional error in coming to her decision the way she did, so as to justify the learned High Court Judge to issue the *certiorari* against her award given in favour of the respondent employee. Her role in a judicial review application ought not to be performed as if she was hearing an appeal, where issues could be opened to be re-ventilated by way of rehearing. As a review court, that role that would be more limited in its scope and as such, more circumscribed. On that note, it would be opportune for us to reproduce the relevant portion of the judgement of this court in the case of *Bayer (M) Sdn Bhd v. Ng Hong Pau* [1999] 4 CLJ 155 Shaik Daud Ismail JCA said on behalf of the panel at p. 159 as follows:

> After reviewing the award of the Industrial Court, the High Court was of the view that the Industrial Court had made a proper evaluation of all the evidence before it and therefore the High Court was of the view that the Industrial Court's conclusion that the dismissal of the respondent was without just cause or excuse, was proper. The High Court found no reason to interfere with the award and dismissed the appellant's application with costs.
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> It is our view that although the High Court is not acting in its appellate capacity in reviewing awards of the Industrial Court, it nevertheless should not interfere in the Industrial Court's findings of facts. In this case, the Industrial Court after hearing evidence from witnesses, came to a finding of fact on the alleged reasons for the dismissal by the appellant in their letter of 17 September 1990 dismissing the respondent, gave two

reasons for the dismissal. It is therefore incumbent on the Industrial Court to determine whether the appellant had shown by evidence that these two reasons exist to justify the dismissal. In *Goon Kwee Phoy v. J & P Coats (M) Bhd* [1981] 2 MLJ 129, the Federal Court at 136 held:

> When representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. *If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.*
>
> (emphasis added)

[28] Based on the above reasons adverted to by us, we were in agreement with learned counsel for the respondent that there was no just and valid excuse on the part of the applicant to dismiss the respondent in the circumstances. The case for a dismissal against the respondent had not been established by the applicant. As such, we had set aside the order of *certiorari* issued by the learned High Court Judge purportedly to quash the award granted by the learned chairman of the IC. The learned chairman of the IC had correctly exercised her duty in inquiring into the propriety of the reasons that were advanced by the applicant when it decided to dismiss the respondent. She had made the findings of facts after hearing the witnesses led by both parties and had preferred the evidence of the respondent by assigning cogent reasons for making those findings. At the end of the day, she found that there was no valid and just excuse for the applicant to mete out that kind of punishment against the respondent. On account of the *Milan Auto* case (*supra*) and lately reiterated by the *Panzana* case (*supra*) she had the necessary jurisdiction to depart from the punishment that was meted out by the employer as the circumstances warranting such a drastic punishment were not established by the applicant before her. As she had not committed any jurisdictional error, it was therefore not open for the learned High Court Judge to disturb her award by issuing a *certiorari* to quash the same.

[29] In the upshot, premised upon the above, we had therefore unanimously allowed the appeal by the respondent with costs of RM15,000 for both here, and below. The order of the High Court Judge dated 27 February 2014 was set aside and the award of the Industrial Court dated 11 July 2013 was therefore reinstated and restored. We also had ordered the deposit to be refunded to the respondent employee who was the appellant in this appeal before us.